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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Video Description of Video Programming	)	MM Docket No. 99-339
	)	
	)	

PETITION FOR RECONSIDERATION

DIRECTV, INC.

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TABLE OF CONTENTS

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PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's rules, DIRECTV, Inc. ("DIRECTV")[1] hereby petitions for reconsideration of the Report and Order adopted by the Commission in the above-captioned docket (the "Order").[2] DIRECTV has participated in all phases of this proceeding and the rules the Commission has adopted will have a substantial impact on DIRECTV's operations. DIRECTV is therefore an interested party within the meaning of Section 1.429(a) of the rules.

I. INTRODUCTION & SUMMARY

New Section 713 of the Communications Act, added by the Telecommunications Act of 1996, deals primarily with closed captioning obligations that Congress directed the Commission to impose on video programming providers or owners. The statute requires the Commission, after conducting an inquiry to determine the level to which video programming is closed

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1 DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, Inc., a licensee in the DBS service and a wholly-owned subsidiary of Hughes Electronics Corporation.

2 *In the Matter of Implementation of Video Description of Video Programming,* MM Docket No. 99-339, Report and Order (rel. Aug. 7, 2000).

captioned, to "prescribe" closed captioning regulations.[3] By contrast, new Section 713(f) directed the Commission only to "commence an inquiry to examine the use of video descriptions on video programming in order to ensure the accessibility of video programming to persons with visual impairments, and report to Congress on its findings."[4] Unlike closed captioning obligations, Congress ordered the Commission to gather more data on video description, but did *not* call for further action. Since Section 713 was enacted, the Commission has issued two reports to Congress detailing possible methods for improving accessibility of video programming, as well as technical and legal issues relating to the provision of video description programming.[5] Following these reports, Congress did not find it necessary to revisit the issue or to enact legislation mandating video description.

Despite the absence of express authority to do so, the Commission nevertheless commenced a rulemaking proceeding proposing broad regulations to require video description of video programming. The commenters in that proceeding demonstrated that implementation of the proposals would be inordinately burdensome to industry, and that they would fail to address the real needs of visually impaired customers. Indeed, many of the comments submitted by advocates for the blind criticized the proposals – some arguing that video description of prime time programming was both unnecessary and unwanted.[6]

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3 47 U.S.C. § 613(b).

4 47 U.S.C. § 613(f).

5 *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,* 13 FCC Rcd 1034 (1998); *Closed Captioning and Video Description of Video Programming; Implementation of Section 305 of the Telecommunications Act of 1996; Video Programming Accessibility,* 11 FCC Rcd 19214 (1996).

6 Comments of the National Federation of the Blind at 1-2.

The Commission nonetheless has adopted burdensome regulations requiring broadcasters, cable operators and multichannel video programming distributors ("MVPDs"), such as DIRECTV, to provide video description programming. Specifically, the rules the Commission has adopted require DIRECTV to:

> (i) provide 50 hours per calendar quarter of prime time and/or children's programming with video description on each of the top five national non-broadcast networks it carries;
>
> (ii) "pass through" any video description it receives from a programming provider if it has the technical capability necessary to do so on the channel on which it distributes the programming of the programming provider;[7] and
>
> (iii) provide local information with aural tone, to the extent that it carries local emergency information through a regularly scheduled newscast or unscheduled newscast that interrupts regularly scheduled programming.

In adopting these requirements, the Commission has gone far beyond the scope of its statutory authority. It also has placed onerous cost burdens on industry to comply with rules that ultimately will not serve their intended purpose and has ignored voluntary efforts that MVPDs, such as DIRECTV, have undertaken to encourage the production of video description programming.

The Commission has no authority to promulgate rules requiring video description. Even assuming it has such authority, the Commission could foster the development of video description programming in a more meaningful way if it used a more flexible approach and

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[7] This requirement is compounded by the fact that DIRECTV now offers local broadcast channel service in 35 major metropolitan markets across the country. These markets encompass all 25 of the TV markets in which the new rules require the top four commercial network affiliates to provide video description programming.

provided better incentives for programmers to create such programming. For these reasons, DIRECTV urges the Commission to reconsider its video description rules.

II. THE COMMISSION LACKS STATUTORY AUTHORITY TO ADOPT RULES MANDATING VIDEO DESCRIPTION PROGRAMMING

While the Commission reads Section 713(f) as "expressing the goal of increasing the accessibility of communications services for persons with disabilities," it is clear that Section 713(f) contains no instruction or authority to do anything more than conduct a study of video description programming in the marketplace. In the absence of such an instruction, the Commission states that it derives authority to adopt the video description rules from its establishment clause[8] and its general regulatory authority under various provisions of the Communications Act.[9] These provisions, however, do not – as the Commission suggests – confer any independent substantive authority to support the adoption of video description rules, particularly in the face of congressional intent to the contrary.

A. Neither The Telecommunications Act Nor The Commission's Ancillary Authority Support The Adoption Of Expansive Video Description Requirements

DIRECTV and many other commenters in this proceeding strongly questioned the Commission's authority to promulgate video description rules. The dissenting Commissioners echo this concern. They agree that Congress intentionally omitted any mention of implementation measures for video description in Section 713(f) as evidenced by the legislative history and the contrasting language in the closed captioning provisions.[10] They further agree

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8 47 U.S.C. § 151.

9 Order at ¶ 54 (citing 47 U.S.C. §§ 151, 152(a), 154(i), 303(r)).

10 Statement of Commissioner Harold W. Furchtgott-Roth at 1-2; Statement of Commissioner Michael K. Powell at 1-3.

that these policy decisions reflect Congress' judgment that the Commission should take action on closed captioning, but that any action on video description is premature.[11]

Section 713(f) simply required the Commission to assess the state of video description technology and to report to Congress on the availability of such programming for visually impaired audiences. Contrary to the Commission's interpretation, Section 713(f) contains no broader authority. The Commission discharged its obligation under Section 713(f) when it submitted its reports to Congress.[12] The Commission may continue to provide such reports to Congress, but without a clearer mandate, any action to implement a video description regime is contrary to both the text and intent of Section 713(f).

The general provisions the Commission relies upon also do not support the adoption of the video description rules. As numerous courts have recognized, "Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities."[13] These provisions merely allow the Commission to issue orders or adopt rules that are necessary in the execution of its functions and do not contravene other provisions of the Act. They do not augment the Commission's authority under Section 713(f): provisions of the Communications Act granting the Commission ancillary authority cannot transform the requirement to conduct a single study on video description into broad authority to implement video description rules. Such a result would completely eviscerate

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11 *Id.*

12 *Cf. Hazardous Waste Treatment Council v. Association of Petroleum Re-Refiners*, 861 F.2d 270, 275 (D.C. Cir. 1988) (holding that the EPA fulfilled its obligations under a similar provision when it delivered its report to Congress).

13 *California v. FCC*, 905 F.2d 1217, 1241 n.35 (9th Cir. 1990) (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 158 (1968)).

the power of Congress to determine the scope of the statutes it passes.[14] The Commission should therefore reconsider its interpretation of Section 713, which cannot be reconciled with the intent of Congress.

B. The Commission's Authority Must Be Construed Narrowly To Avoid First Amendment Conflicts

Because statutes are to be construed, if possible, so as to avoid constitutional difficulties,[15] the Commission should not attempt to construe its limited authority under Section 713(f) to justify a mandatory video description regime. As many commenters indicated during the proceeding, any requirement to provide video description necessarily raises questions of compelled speech and content regulation.[16] By requiring programming distributors to provide video description programming, the Commission not only compels speech, it also places undue constraints on a licensee's ability to engage in other types of speech.

In DIRECTV's case, the First Amendment problem is profound. As DIRECTV has indicated previously, it strives to serve a variety of audiences with special needs with unique services tailored to those needs.[17] Indeed, DIRECTV is among the first MVPDs to respond to increased consumer demand for Spanish-language programming by launching DIRECTV PARA

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14 *Lyng v. Payne,* 476 U.S. 926, 937 (1986) ("[A]n agency's power is no greater than that delegated to it by Congress.").

15 *Rust v. Sullivan,* 500 U.S. 173, 190-191 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council,* 485 U.S. 568, 575-576 (1991).

16 *Hurley v. Irish-American Gay Group of Boston,* 515 U.S. 557, 573 (1995) ("Since all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"); *Riley v. National Federation of the Blind of N.C., Inc.,* 487 U.S. 781, 796-797 (1988).

17 DIRECTV Comments at 1-2.

TODOS™ ("DIRECTV For Everyone"), a bilingual programming service.[18] DIRECTV utilizes the secondary audio program ("SAP") channel, where available, for Spanish language programming.

As DIRECTV pointed out in its comments, any mandate to provide video description over the SAP channel will preclude the use of the channel for Spanish language programming.[19] While the Commission was aware that the SAP channel is used for a variety of different services, including, in many cases, the provision of Spanish language programming,[20] it nonetheless adopted rules that conflict with this use and effectively prioritize one type of speech – and one underserved community – over another. The Commission reasoned that because only 50 hours of video description programming per quarter are required, the rules "avoid any conflicts between competing uses of the SAP channel."[21] This rationale simply does not provide adequate support for the implementation of a content-based restriction on speech. DIRECTV therefore urges the Commission to reconsider its approach.

III. THE VIDEO DESCRIPTION RULES DO NOT MAKE SENSE FROM A POLICY PERSPECTIVE

In addition to the lack of statutory support for the rules the Commission has adopted, DIRECTV believes that the framework contains several infirmities that will undermine the goals the Commission seeks to achieve. First, the Commission should not require programmers, broadcasters, or MVPDs to utilize the SAP channel for alternating purposes. This requirement

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18 DIRECTV PARA TODOS offers more than 33 channels of Spanish-language programming.

19 Comments of DIRECTV at 2-3.

20 Notice at ¶ 30.

21 Order at ¶ 34.

will cause customer confusion and frustration, and will not measurably increase the availability of video description programming. Second, the Commission failed to adequately address the significant costs its framework imposes on MVPDs in general, and DBS operators in particular. The imposition of such costs will have long-ranging effects on competition in the MVPD market and will subvert voluntary efforts to increase video description programming. Finally, the Commission's rules place the responsibility of providing 50 hours per quarter of non-broadcast programming on the wrong party. Because distributors do not have the ability to ensure compliance with the requirements, the Commission's rules should place the requirement on programmers themselves.

A. Intermittent Use Of The SAP Channel For Video Description Will Confuse And Frustrate Consumers

As DIRECTV indicated in its previous comments, DIRECTV already offers video description programming on a voluntary basis in a manner that encourages networks to provide video description 24 hours per day. DIRECTV does so by requiring those networks that operate on channels that are equipped with a SAP channel to use the SAP channel full time and for consistent purposes. This approach reflects DIRECTV's concern that consumers who rely upon video description programming may be confused if the SAP channel only carries video description programming for a few hours per week. Disregarding this concern entirely, the Commission dismissed the idea that its rules would result in customer confusion. Instead, the Commission bluntly noted that such problems should be resolved through customer education.[22]

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22 *Id.*

DIRECTV disagrees that consumer education will alleviate the problems that intermittent use of the SAP channel will cause. Subscribers who rely on foreign language translations will be confused and frustrated when they begin receiving video description on the SAP channel. Likewise, subscribers who rely on video description will be confused and frustrated when they receive foreign language translations, rather than video description. To the extent that programmers or broadcasters alternate their uses of the SAP channel, these problems are unavoidable. DIRECTV will be required to dedicate staff and resources to address these consumer issues on a permanent basis, as one-time consumer education measures simply will not alleviate the problem.

DIRECTV believes that requiring programmers to utilize their SAP capacity full time minimizes customer confusion and, at the same time, maximizes programmers' incentives to fund video description. These voluntary measures more effectively meet the needs of visually-impaired audiences, and balance their needs with the needs of other audiences without intrusive government regulation of content. The Commission's mandatory video description regime will undermine the voluntary efforts that have been made to date. DIRECTV urges the Commission to reconsider its mandatory video description regime and to encourage voluntary efforts to increase the availability of video description programming.

B. The Commission Fails To Address The Technical And Financial Burdens The Requirements Will Place On DBS Operators

The most disturbing aspect of the Commission's new video description regime is the Commission's complete lack of concern for the costs involved in its implementation. Despite the commenters' indications that the costs imposed would be high,[23] the Commission devotes little discussion in the Order to this subject. With respect to the costs it imposes on DIRECTV, in particular, the Commission states: "DIRECTV . . . had more than 8.5 million customers as of May 2000, and DBS' average programming price was $30 per month. This means that DIRECTV subscriber revenues appear to be over $250 million per month, or over $3 billion per year."[24] Thus, the Commission bases its conclusion that video description costs are insignificant on a fictitious revenue figure extrapolated from the number of DIRECTV's subscribers and an "average" price for a programming package.

Even if the Commission's calculation methods were not so troubling, gross revenues are an inappropriate measure of a DBS operator's ability to bear the expenses associated with the new video description rules. Commissioner Powell makes the same observation in his dissent, noting that use of gross revenue figures without consideration of other operating costs is "like considering a person's ability to shoulder an additional financial burden based on his overall income without regard to his existing burdens (*e.g.*, rent or mortgage, tuition, car and insurance payments)."[25] Indeed, in more than six years of operation, DIRECTV has still not recovered the investment it has made in research and development of satellites, launch and operation of satellites, programming costs and the development and marketing of services. The imposition of

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23 *See, e.g.,* Comments of DIRECTV at 6-7; Comments of the National Association of Broadcasters at 15-19; Comments of the National Cable Television Association at 23.

24 Order at ¶ 28.

25 Separate Statement of Commissioner Michael K. Powell at 8.

such costs on a business that has yet to become profitable, and that must compete on a day-to-day basis with vertically integrated, market dominant cable operators, will undoubtedly affect competition in the MVPD market to an extent that the Commission has failed to consider.

As DIRECTV explained in its comments in this proceeding, only a small percentage of its existing channels are equipped with a SAP channel, and many of these are utilized for Spanish language programming. For purposes of the rules concerning video description programming for the top five nonbroadcast networks, the new rules appear to require DIRECTV to add an additional audio program to these channels.[26] If this interpretation is correct, the addition of SAP channels under such circumstances will require modification of DIRECTV's uplink and downlink systems used to transmit and decode these channels. Beyond the substantial cost of upgrading its systems, the new rules will require DIRECTV to bear additional costs, including:

(i) the addition of video description programming to the top five nonbroadcast networks, estimated at $4,000 per hour;

(ii) staff and marketing materials necessary to educate consumers and to field questions and complaints from consumers who utilize the SAP channel for Spanish language programming;

(iii) the implementation of internal compliance measures, such as monitoring equipment and additional staff; and

(iv) the opportunity costs incurred from reserving the SAP channel for video description rather than to provide new interactive services in high demand.

26 While new rules require pass through of video description programming provided by broadcasters, these rules wisely limit the obligation to channels that already have SAP capacity.

These costs are not as insignificant as the Commission suggests, particularly when combined with the reality that DIRECTV does not have $3 billion per year at its disposal, as the Commission appears to assume. Because of the costs involved, DIRECTV urges the Commission to reconsider its requirement that MVPDs must provide video description for the top five non-broadcast channels.

C. The Responsibility For Video Description Of Non-broadcast Programming Should Be Placed On Programmers, Not MVPDs

A final infirmity in the Commission's mandatory video description framework is that it requires MVPDs to provide video description on each of the top five national nonbroadcast networks they carry, regardless of the fact that MVPDs may not be in the business of providing programming themselves and may not have control over the feed they receive from programmers. Indeed, DIRECTV is not in the business of originating video programming and does not have the facilities that would be needed to describe programming offered on non-broadcast networks. In addition, most of DIRECTV's programming contracts expressly prohibit DIRECTV from altering the feed in any way. To comply with the Commission's rules, DIRECTV must rely on programmers to supply the required video description, or must incur the expense of providing video description itself. DIRECTV also must monitor each SAP channel on which the programmer supplies video description on an ongoing basis to ensure that the programming supplier complies with the rules to avoid the penalties the Commission may impose.

MVPDs that merely pass through programming to subscribers should not be responsible for ensuring that programmers comply with the video description rules. In cases of non-compliance that are brought before the Commission, the new rules place the burden of proving compliance on MVPDs, even though the only thing an MVPD can do if a programmer violates the rules is seek indemnification for any liability incurred after the fact. By placing this burden on MVPDs, the rules subject MVPDs to costly litigation over requirements they have no ability to effectuate. While the Commission evidently has adopted this framework to be consistent with the closed captioning regime, DIRECTV believes that the costs associated with the more complicated production of video description programming vastly outweigh those associated with the provision of closed captioning. The Commission must remedy this problem by placing the burden on the appropriate party.

IV. CONCLUSION

While DIRECTV has supported and continues to support the goal of making its programming available to as many subscribers as possible, regardless of physical impairment, DIRECTV believes the Commission lacks the statutory authority to impose its video description framework. Moreover, the framework will impose enormous burdens on DBS operators while failing to serve the Commission's expressed goals. Although the Commission can and should make every effort to maximize the accessibility of video programming to visually-impaired individuals, the Commission should do so in a manner that is consistent with its statutory authority and adequately considers the needs expressed by visually-impaired individuals balanced against the costs of implementation.

Respectfully submitted,

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